SUPREME COURT, U. S.

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In The Supreme Court of The United States

OCTOBER TERM, 1975

No. 75-161

MARIANO A. ROMAGUERA, ET AL.,
Petitioners

v.

AMECO CORPORATION, ET AL.,
Respondents

ON APPEAL FROM AN ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERTO BURÓ ABOY
Counsel for the Trustee-Respondents
P.O. Box 11086
Santurce, P.R. 00910
Tel. 724-4114

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mr. Abrahán Díaz González, Trustee of the debtor corporations, respondents herein, prays that a writ of certiorari petitioned in the above captioned case be denied.

STATEMENT OF THE CASE

Respondents consider that the first three paragraphs of the Statement of the Case made by Petitioners are basically correct. Nevertheless, respondents disagree with the rest of the Statement of the Case made by Petitioners and do present the following aspects as the correct Statement of the Case in this matter.

Petitioners did present a position alleging that they were entitled to plenary proceedings, but only through a motion dated October 29, 1973 (see, Exhibit 2 of the Petitioners), which was over three years after the commencement of the bankruptcy proceedings, during which three years Petitioners had been active parties to said proceedings without at any time raising the possibility of their being entitled to plenary proceedings. Furthermore, at no time did Petitioners present any type of request or position to the District Court stating that a Trustee had the burden of affirmatively proving all the essential elements of an illegal preference at *one* hearing. On the contrary, the District Court was supplied throughout the proceedings in bankruptcy with all the evidence necessary to determine the legal point as to whether Petitioners were secured or unsecured creditors of Respondents. This evidence was accepted by all the parties involved including the Petitioners. In view of the above, the requirements for the presentation of evidence were met before the District Court, which was thus put in a position by all the parties wherein it could render a decision as to the nature of the credit held by Petitioners against Respondents. Petitioners accepted in writing that the date of the presentation of their mortgage at the Registry of Property of the Commonwealth of Puerto Rico was within the four months prior to the filing of the petition; in fact, it was six days before

the Filing. The Court was also informed that the mortgage had been executed more than two years prior to the presentation at the Registry of the Property. Therefore, as of the date of presentation for registration, the mortgage was guaranteeing an antecedent debt. Petitioners did not oppose the insolvency of the Respondents throughout the proceedings, although there were hearings in this regard at which Petitioners' attorney participated (see, Exhibit 1, Appendix "A"-4, of Petitioners' brief), and the Petitioners themselves in their Proofs of Claim filed in the bankruptcy proceedings claimed that Respondents were in arrears as to both principal and interest owed to Petitioners by said Respondents. The resulting depletion of the estate of Respondents need not be discussed in any great length since the payment to Petitioners of their claim in full as a secured claim would reduce the amount of money left to distribute among unsecured creditors and also would give Petitioners a larger percentage of their debt than any other creditor in the unsecured class. All these facts were not only uncontested but they were supplied to the District Court either directly by Respondents or with their acceptance, and provide the necessary elements of a preference under section 60(a) of the Bankruptcy Act. 11 U.S.C. § 96.

Regarding Petitioners Cesani Hardware, Inc. and Mayaguez Ready Mix, Inc., a hearing related to the payment of interest to Trust Mortgage Corporation was held on November 10, 1972 (see, Exhibit 1, Appendix "A"-4 of Petitioners' brief), at which hearing attorney for Petitioners was present and did not oppose the payment of the interest to Trust Mortgage Corporation which was part of the Sale Agreement authorized by the Court with the consent of the parties at the above mentioned hearing. As a result of the above fact, the objections presented by Cesani Hardware, Inc. and

Mayaguez Ready Mix, Inc. on December 11, 1972 were not timely made, a hearing having already been held on the matter of payment of interest to Trust Mortgage Corporation.

The District Court, with all the facts mentioned above, had enough evidence before it to determine the question of whether Petitioners' credit against Respondents was of a secured or an unsecured nature, and on January 21, 1974 the District Court rendered its decision on the matter. The United States Court of Appeals for the First Circuit affirmed the District Court's order in all respects and entered a judgement on March 12, 1975.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Petition and indeed the facts of the case do not present any reason under Rule 19 of the Rules of the Supreme Court of the United States to call for the exercise of this Honorable Court's power of supervision.

2. The constitutional requirement of a "hearing" was met during the proceedings before the District Court in the present case and enough evidence was presented to it in order to decide the question of whether Petitioners' credits were an unlawful preference under the Bankruptcy Act.

Rule 19 of the Supreme Court of the United States has not been met. First of all, there is no state court decision involved and therefore subparagraph (a) of Rule 19 is not applicable to this case. Secondly, Petitioners have neither alleged nor presented any proof wherein paragraph (b) of Rule 19 could be used. Said paragraph reads as follows:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners state what they consider is the rule for avoiding preferences in bankruptcy cases, but do not demonstrate in what way, if at all, the Court of Appeals rendered a decision in conflict with said rule. On the contrary, the Circuit Court in its Per Curiam opinion of March 12, 1975 specifically states:

> "Although appellants stress that the burden is on the Trustee to establish each of the elements of a voidable preference, our study of the record has convinced us that only the 'insolvency' and 'reasonable cause to believe' issues are substantial enough to merit discussion . . . It is true that July 31 is the relevant date as far as the mortgage is concerned, but there can be no doubt that, in the absence of evidence to the contrary, insolvency at the time of filing adequately supports the inference that the debtor corporations were insolvent one week earlier.
>
> "There was also adequate support for the conclusion

that at the time of the transfer appellants had reasonable cause to believe that the debtors were insolvent . . ." (see, Appendix "A"-2, Petition)

The Circuit Court actually applied the rule mentioned above and, after a study of the record of the case, affirmed the District Court and thus ruled against Petitioners. All this Honorable Court has before it now is a case which Petitioners lost because both the District Court and the Circuit Court applied a correct standard in conjunction with the evidence presented. This does not meet the requirements of Rule 19(b) (*supra*).

The Fifth Amendment to the Constitution of the United States does not require any formalistic type of hearing. This Honorable Court has so stated in the case of *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1937) wherein at page 351 the Court said: "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." Therefore, if the parties have had their right to be heard during the judicial proceeding, no specific type of hearing is necessary under the Fifth Amendment. "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits . . . . What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner', *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case', *Mullane* v. *Central Hanover Tr. Co., supra*, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971). From the facts of this case, it is obvious that Respondents not only

had an opportunity to be heard throughout the proceeding, but actually participated in said proceeding in such a manner that they both in writing and by their actions accepted the facts for the District Court which put the said court in a position to rule on the legal question as to whether the credits held by Petitioners against Respondents were of a secured or an unsecured nature. An additional "hearing" would have only served the purpose of presenting the same evidence and the same facts to the District Court which had already been presented to it by the parties to the proceedings including Petitioners. This Court has said that "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg* v. *Kelly,* 397 U.S. 254, 268-269 (1970). In the present case the Petitioners were represented by counsel and their acceptance of the facts used by the District Court was done through their counsel so that Petitioners were afforded full legal representation. Certainly the Fifth Amendment to the Constitution of the United States does not require any further rule in defense of Petitioners' rights. In the *Goldberg* case, *supra* at 267, this Court restated the following proposition: "The fundamental requisite of due process of law is the opportunity to be heard." and cited the case of *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914). The United States Court of Appeals for the First Circuit specifically found upon reviewing the evidence presented by Petitioners, who were appellants before that Court, that evidence to sustain all the requisites of an illegal preference under the Bankruptcy Act had been presented to the District Court. Contrary to Petitioners' allegations before this Honorable Court, neither the District Court nor the Court of Appeals used presumptions in order to decide the case at bar. What the District Court did was to take the evidence before it and infer results from the facts presented, which is exactly what the District

Court receiving evidence is supposed to do. Upon reviewing the District Court's action, the Circuit Court found that the former had acted correctly. A mere adverse final decision resulting from the facts proven in a particular case is not enough for the losing party to allege that the Court had not sufficient evidence before it to decide the case. This is exactly what Petitioners are trying to do before this Honorable Court in their argument based on the Federal Rules of Evidence. Said argument is completely inappropriate in the present case since Rule 301 of the Federal Rules of Evidence would not be applicable due to the fact that presumptions were not used either by the District Court nor by the Court of Appeals in the decision of the case.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

ROBERTJ BUSÓ ABOY
Counsel for
Trustee-Respondents
P.O. Box 11036
Santurce, P.R. 00910